Earle Equipment Company *and* Local 324, International Union of Operating Engineers, AFL-CIO. Case 7-CA-22538

21 May 1984

ORDER DENYING MOTION

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

Upon a charge filed by the Union 26 August 1983 the General Counsel of the National Labor Relations Board issued a complaint, backpay specification, and notice of hearing 30 September 1983 against the Company, the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act and that it owes specified amounts of backpay. Although properly served copies of the charge and complaint and backpay specification, the Company has failed to file an answer to the complaint or backpay specification. By letter dated 9 December 1983 the Acting Regional Attorney informed the Respondent that unless it filed an answer to the complaint and backpay specification by 22 December 1983 or otherwise obtained an extension of time to file an answer, the General Counsel would file a Motion for Default Judgment. By letter dated 19 December 1983 Daniel N. Pevos, an attorney for the Company, informed the Acting Regional Attorney that the Respondent was a debtor in Chapter 11 proceedings, No. 82-00489-BE, and did not intend to defend the pending complaint.

On 30 December 1983 the General Counsel filed a Motion for Default Judgment. On 5 January 1984 the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Company filed no response.

Ruling on Motion for Default Judgment

The complaint alleges that 19 August 1983 the Company violated Section 8(a)(5) and (1) of the Act by bypassing the Union by informing unit employees of a 10-percent pay reduction and the elimination of all fringe benefits except hospitalization insurance coverage. Further, the complaint alleges that the Company, on the same date, violated Section 8(a)(5) and (1) by repudiating its collective-bargaining agreement with the Union by laying off employee Henry Roggenbeck and hiring a new employee at a lower pay rate than that specified in the contract to avoid the contract's economic provisions.

On 22 February 1984 the United States Supreme Court decided *NLRB v. Bildisco & Bildisco*, 115 LRRM 2805, 100 LC ¶ 10,771 (1984). The Court held that the Bankruptcy Court should permit rejection of a collective-bargaining agreement if the debtor in Chapter 11 proceedings can show that the agreement burdens the estate and that the equities balance in favor of rejection. The Court also held that a debtor-in-possession does not commit an unfair labor practice when it unilaterally rejects or modifies a collective-bargaining agreement before the Bankruptcy Court approves formal rejection. In connection with this second holding, the Court stated, in pertinent part:

> [T]he Board is precluded from, in effect, enforcing the contract terms of the collective-bargaining agreement by filing unfair labor practices against the debtor-in-possession for violating § 8(d) of the NLRA. Though the Board's action is nominally one to enforce § 8(d) of the Act, the practical effect of the enforcement action would be to require adherence to the terms of the collective-bargaining agreement. But the filing of the petition in bankruptcy means that the collective-bargaining agreement is no longer immediately enforceable, and may never be enforceable again. Consequently, Board enforcement of a claimed violation of § 8(d) under these circumstances would run directly counter to the express provisions of the Bankruptcy Code and to the Code's overall effort to give a debtor-in-possession some flexibility and breathing space. See H.R. Rep. No. 95-595, p. 340 (1977). We conclude that from the filing of a petition in bankruptcy until formal acceptance, the collective-bargaining agreement is not an enforceable contract within the meaning of NLRA § 8(d). Cf. *Allied Chemical Workers*, supra, at 187; *Dowd Box Co. v. Courtney*, 368 U.S. 502, 510–513 (1962). [Id. at 2815.]

Although the Respondent failed to file an answer to the complaint and backpay specification, it stated in its 19 December 1983 letter to the Region that it is a debtor in Chapter 11 proceedings. Nothing before us, however, informs us when the Respondent filed the bankruptcy petition, whether the alleged violations occurred before or after the filing date, whether or when the Respondent formally accepted the collective-bargaining agreement after filing the petition, or whether the Bankruptcy Court permitted the rejection of the contract. Such information is critical in deciding whether the Respondent has violated the Act. Accordingly, in light of *Bildisco*, further investigation by the Regional Director into the circumstances surrounding the filing of the bankruptcy petition is necessary. The General Counsel's Motion for Default Judg-

ment must therefore be denied and the case remanded to the Regional Director.

The General Counsel's motion must also be denied for an additional reason. On 30 September 1983 the General Counsel issued a combined complaint, backpay specification, and notice of hearing against the Company. Section 102.52 of the Board's Rules and Regulations, however, clearly authorizes the issuance of a backpay specification only:

> [*a*]*fter* the entry of a Board order directing the payment of backpay or the entry of a court decree enforcing such a Board order, if it appears to the regional director that a controversy exists between the Board and a respondent concerning the amount of backpay due which cannot be resolved without a formal proceeding . . . . [Emphasis added.]

Accord, Section 101.16 of the Board's Statements of Procedure. Because there has been no prior Board order requiring backpay or an enforcing court decree, issuance of a backpay specification is inappropriate in the instant case.

ORDER

The General Counsel's Motion for Default Judgment is denied, and the proceeding is remanded to the Regional Director for further investigation and consideration.